

N.D.A.G. Letter to McBeth (Dec. 30, 1988)

December 30, 1988

Mr. Ronald W. McBeth
Assistant State's Attorney
Office of the Richland County
State's Attorney
Law Enforcement Center
413 Third Avenue North
Wahpeton, ND 58075

Dear Mr. McBeth:

Thank you for your letter of December 21, 1988. Your letter asks whether a county court, pursuant to N.D.C.C. § 30.1-27-04 has jurisdiction and authority to appoint a guardian for a minor child upon application by the child's parents, when one or both parents are living, competent, and have no physical or mental disabilities, their parental rights of custody have not been terminated or suspended by court order, and it appears that the primary reason for the guardianship is to avoid payment of tuition to a North Dakota public school district.

The county court has subject matter jurisdiction to consider a petition to appoint a guardian for a minor child. N.D.C.C. § 30.1-02-02. I will assume, for the purposes of this response, that the county court also has personal jurisdiction over all relevant parties.

N.D.C.C. § 30.1-27-04 governs when the county court has the power to appoint a guardian for an unmarried minor. That section provides that the court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order.

According to the facts given in your letter, no court order has terminated or suspended any parental rights of custody. Therefore, the sole remaining question is one of fact: Have all parental rights of custody been terminated or suspended by circumstances? Your letter states that one or both parents are living, competent, and have no physical or mental disabilities. These facts would certainly tend to negate an assertion that "all parental rights of custody have been terminated or suspended by circumstances." However, these facts would not utterly preclude the possibility of a petitioner making the requisite factual showing.

I cannot act as the finder of fact in such a case. Instead, I must defer to the factual determinations of the county court. It does not appear likely, however, given these facts, that a desire to avoid paying tuition to a North Dakota public school district would meet the statutory requirements of N.D.C.C. § 30.1-27-04.

I hope this information is helpful.

Sincerely,

Nicholas J. Spaeth

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